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In Pari Delicto and the Deterrence of Antitrust Violations

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Note: *In Pari Delicto* and the Deterrence of Antitrust Violations

I. INTRODUCTION

Deterrence of antitrust violations is an important public policy goal.¹ Although federal criminal² and civil³ antitrust actions represent potent tools in pursuing that goal,⁴ funding has not kept pace with the enormous expense required to enforce the law systematically,⁵ and, despite their unusually high success rate, government suits are simply too infrequent⁶ to prevent large-scale violation of the law. Thus, even though the success rate of private civil damage actions⁷

1. Competitive business practices are assumed to be essential to the well-being of the American economy. Competition supposedly yields the optimal allocation of national resources, goods of the highest quality at lowest prices, and maximal industrial health and progress. See *Northern Pac. Ry. v. United States*, 356 U.S. 1, 4 (1958) (dictum). It is the general purpose of antitrust enforcement to ensure that such competition survives. See *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 138-39 (1968).

2. See Sherman Act §§ 1-3, 15 U.S.C. §§ 1-3 (Supp. V 1975).

3. See Sherman Act § 4, 15 U.S.C. § 4 (1970); Clayton Act § 4a, 15 U.S.C. § 15a (1970).

4. In the period 1960-1964, the Justice Department won 85% of its cases. This figure includes civil actions terminated by consent decrees and criminal actions in which pleas of *nolo contendere* were entered. Posner, *A Statistical Study of Antitrust Enforcement*, 13 J.L. & Econ. 365, 381-82 (1970). The Justice Department has already won 34% of all actions filed in 1975-1976, with a substantial number of the remainder still in litigation. See [1977] 4 TRADE REG. REP. (CCH) ¶ 45,075.

5. Posner hypothesizes that the number of cases brought by the Justice Department has not increased significantly, despite the tremendous growth of the economy, because the price of enforcement has risen even faster than prices in general: "the same percentage of Gross National Product devoted to antitrust enforcement buys less of it than formerly." Posner, *supra* note 4, at 367.

6. In 1976 the government instituted only 65 civil and criminal actions. Of these, 26 (40%) were criminal, and 39 (60%) were civil. See [1977] 4 TRADE REG. REP. (CCH) ¶ 45,075. Although this total is higher than the Justice Department's average since 1940, see Posner, *supra* note 4, at 385 (from 1940 through 1969 the government instituted an average of 38 actions per year), the number of suits instituted has not varied significantly in recent years, see [1975] ATT'Y GEN. REP. ON FED. LAW ENFORCEMENT AND CRIM. JUST. ASSISTANCE ACTIVITIES 137 (67 actions were filed in 1974; 72 in 1975).

7. Private civil damage suits are authorized by section 4 of the Clayton Act, 15 U.S.C. § 15 (1970):

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

falls far short of that enjoyed by the Justice Department,⁸ the relative frequency⁹ of these suits makes the deterrent effect of treble damage actions¹⁰ an increasingly important aspect of the effort to eliminate anticompetitive activity.

Ironically, the parties best situated to maintain private antitrust actions are often those who have themselves been participants in anticompetitive activity. Persons involved in a conspiracy may possess evidence of illegality unobtainable by government prosecutors or uninvolved third persons.¹¹ Such coconspirators are therefore uniquely equipped to prosecute a civil action against another offending entity, and the ability to tap this group as potential plaintiffs should have a dual deterrent effect. First, it should make past violations easier to detect and prove, and, second, it should make entities contemplating joint anticompetitive activity less willing to risk trusting each other.

Historically, however, antitrust defendants have shielded themselves from liability to culpable plaintiffs with the equitable defense of *in pari delicto*,¹² which barred a plaintiff's action for the redress of

Parties suing under section 4 function as "private attorneys general," *Alpine Pharmacy, Inc. v. Charles Pfizer & Co.*, 481 F.2d 1045, 1050 (2d Cir.), *cert. denied*, 414 U.S. 1092 (1973), "supply[ing] an ancillary force of private investigators to supplement the Department of Justice in law enforcement," *Weinberg v. Sinclair Ref. Co.*, 48 F. Supp. 203, 205 (E.D.N.Y. 1942), thereby deterring anyone contemplating anticompetitive conduct. See 13 J. VON KALINOWSKI, *ANTITRUST LAWS AND TRADE REGULATION* § 99.03, at 99-4 (1977). But see note 95 *infra* for a discussion of the inefficacy of the private plaintiff's remedies as a deterrence mechanism.

8. In 1969, for example, only eight of 221 cases ended in judgment for the plaintiff. Another 156 were dismissed by action of the parties, however, and it is reasonable to infer that the bulk of these dismissals followed a settlement that was at least partially favorable to the plaintiff. See Posner, *supra* note 4, at 382-83.

9. In contrast to the small number of government actions, see note 6 *supra*, 4,257 private antitrust cases were initiated from 1960 to 1969. Posner, *supra* note 4, at 371. This figure excludes an additional 2,233 actions that grew out of the "electrical conspiracy cases," discussed at note 85 *infra*. In 1974 alone, the latest year for which statistics are available, 1,227 private actions were brought. [1974] AD. OFF. OF THE U.S. COURTS, ANN. REP. 226. Private suits are often preceded by a judgment against the defendant in a Justice Department action. This facilitates private suits because it is "prima facie evidence" against the defendant. See Clayton Act § 5, 15 U.S.C. § 16 (Supp. V 1975). The government's judgment estops the defendant from denying any matter established in the prior proceeding. Plaintiff is therefore spared the task of proving a violation and need only prove injury and the measure of his damages. See 15 J. VON KALINOWSKI, *supra* note 7, § 111.01, at 111-2, 111-3.

10. See 13 J. VON KALINOWSKI, *supra* note 7, § 99.03, at 99-4. Although the threat of treble damage actions is an effective deterrent, it is not without its limits. See notes 93-95 *infra* and accompanying text.

11. See 13 J. VON KALINOWSKI, *supra* note 7, § 99.03, at 99-4.

12. The defense takes its name from the Latin maxim, *in pari delicto portior est conditio defenditis* ("In a case of equal or mutual fault . . . the condition of the . . .

wrongful acts in which he had participated.¹³ This doctrine has traditionally been justified on the grounds that (1) permitting recovery by culpable plaintiffs would encourage anticompetitive conduct;¹⁴ (2) allowing a wrongdoer to profit from his own illegality would be offensive to our judicial traditions;¹⁵ and (3) since the actual damages suffered were at least partially the result of plaintiff's own participation, the defendant's acts were not the sole or proximate cause of injury.¹⁶

In 1968, a plurality of the United States Supreme Court, in *Perma Life Mufflers, Inc. v. International Parts Corp.*,¹⁷ claimed to reject these traditional justifications for application of *in pari delicto* and to foreclose continued use of the defense in civil antitrust actions.¹⁸ The opinion, however, was ambiguous. While the repudiation appeared to be absolute, other language seemed to leave room for assertion of an equitable defense closely resembling *in pari delicto* in certain cases.¹⁹ Moreover, each of the minority opinions, representing the views of five of the Justices,²⁰ emphasized the importance of pre-

[defendant] is the better one."). BLACK'S LAW DICTIONARY 898 (4th rev. ed. 1968). The defense should not be confused with other defenses asserted in civil antitrust actions relating to the plaintiff's culpability or right to recovery. See, e.g., *UMW v. Pennington*, 381 U.S. 657, 670 (1965) (plaintiff's efforts to influence public officials to implement policies detrimental to competitors do not violate antitrust laws regardless of plaintiff's anticompetitive intent); *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211, 214 (1951) (plaintiff's alleged unclean hands stemming from unrelated antitrust violations do not preclude its suit under Sherman Act). See also note 47 *infra*.

The doctrine's applicability is not limited to antitrust. See, e.g., *Taras v. Pittsburgh Nat'l Bank*, 555 F.2d 1152 (3d Cir. 1977) (defense applied to preclude recovery by "tippees" in 10b-5 suit against "tipsters"), *petition for cert. filed*, 46 U.S.L.W. 3054 (U.S. Aug. 16, 1977) (No. 77-195). But see *Nathanson v. Weis, Voisin, Cannon, Inc.*, 325 F. Supp. 50 (S.D.N.Y. 1971) (defense not available to "tipsters" against "tippees").

13. See 2 J. POMEROY, A TREATISE ON EQUITY JURISPRUDENCE § 402, at 117 (5th ed. 1941).

14. See, e.g., Brief for Respondents at 36-37, *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134 (1968).

15. See, e.g., *id.* See generally *Northwestern Oil Co. v. Socony-Vacuum Oil Co.*, 138 F.2d 967, 971 (7th Cir. 1943), *cert. denied*, 321 U.S. 792 (1944); *Eastman Kodak Co. v. Blackmore*, 277 F. 694, 697-99 (2d Cir. 1921); *Bluefields S. S. Co. v. United Fruit Co.*, 243 F. 1, 18 (3d Cir. 1917), *error dismissed per stipulation*, 248 U.S. 595 (1919); *Mid-West Theatres Co. v. Co-operative Theatres*, 43 F. Supp. 216, 224 (E.D. Mich. 1941).

16. See, e.g., Brief for Respondents at 36-37, *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134 (1968). See generally *Bishop v. American Preservers Co.*, 105 F. 845, 846 (N.D. Ill. 1900).

17. 392 U.S. 134 (1968).

18. See text accompanying notes 26-32 *infra*.

19. See text accompanying notes 33-37 *infra*.

20. Justices White, Marshall, and Fortas concurred separately. Justice Harlan, joined by Justice Stewart, concurred in part and dissented in part.

serving some defense that would prevent culpable plaintiffs from recovering antitrust damages.²¹ Thus it is not surprising that, despite the apparent clarity and breadth of the plurality's holding, the *Perma Life* decision has created confusion among the lower courts.²²

This Note, in order to define the appropriate role of the defense in antitrust litigation, will review the current judicial approach to *in pari delicto* and examine the various factors that promote or discourage antitrust violations. In addition, suggestions will be offered to the courts for applying the Note's theoretical guidelines to actual assertions of the defense in antitrust litigation so that the courts will be equipped with criteria that will enable them to utilize *in pari delicto* to maximize deterrence of antitrust violations.

II. PERMA LIFE AND ITS PROGENY: THEORETICAL DEFECTS

A. THE SUPREME COURT GUIDELINES

The plaintiffs in *Perma Life* were owners of Midas Muffler Shops, operating under franchise agreements with defendant Midas, Inc., a subsidiary of defendant International Parts. Plaintiffs alleged that provisions of the franchisor's sales agreement that required purchase of all franchise supplies from Midas, Inc., prevented sales by franchisees outside a designated territory, fixed retail selling prices on all goods, and conditioned selling Midas Mufflers on the marketing of the complete line of Midas products violated section 1 of the Sherman Act²³ and related antitrust statutes.²⁴ Defendants urged dismissal under the doctrine of *in pari delicto*, arguing that

21. See text accompanying notes 38-49 *infra*.

22. See notes 54-67 *infra* and accompanying text.

23. 15 U.S.C. § 1 (1970):

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: . . . Every person who shall make any contract or engage in any combination or conspiracy . . . shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

The 1974 amendments to the Sherman Act made violation of section 1 a felony and increased the maximum penalties to fines of \$1,000,000 for corporations and \$100,000 for individuals, or imprisonment for three years, or both. See Antitrust Procedures and Penalties Act, Pub. L. No. 93-528, 88 Stat. 1706 (codified at 15 U.S.C. § 1 (Supp. V 1975)).

24. Clayton Act § 2(a), as amended by Robinson-Patman Act, 15 U.S.C. § 13 (1970) (prohibiting price discrimination between different purchasers of comparable goods); Clayton Act § 3, 15 U.S.C. § 14 (1970) (proscribing sales or contracts made on agreement not to use or deal in goods of competitors).

plaintiffs had willingly sought their franchises with full knowledge of the allegedly illegal contract provisions, that they had derived substantial profit from the franchise arrangement, and that they had sought and acquired additional franchises. On the basis of this *in pari delicto* defense the district court granted the defendant's motion for summary judgment.²⁵

Justice Black, writing the plurality opinion,²⁶ found nothing in the antitrust laws to indicate that Congress had intended to permit the defense of *in pari delicto* as a bar to treble damage actions.²⁷ The plurality held that absent such an intent it was inappropriate to allow any broad common law²⁸ doctrine to impede private actions that served an important public purpose.²⁹ Stressing that antitrust enforcement was facilitated by the ever-present threat of treble damage suits and that the "overriding public policy in favor of competition"³⁰ mandated encouragement of private actions even when the plaintiff was also culpable,³¹ the plurality held that "the doctrine of *in pari delicto*, with its complex scope, contents, and effects, is not to be recognized as a defense to an antitrust action."³²

The sweep of this holding was vitiated, however, when Justice

25. The Court of Appeals for the Seventh Circuit affirmed the trial court's summary judgment for defendants on *in pari delicto* grounds but reversed the summary judgment against plaintiffs' related allegations of discrimination by defendants as to more favorable prices and services for some franchises than others. *Perma Life Mufflers, Inc. v. International Parts Corp.*, 376 F.2d 692 (7th Cir. 1967), *rev'd*, 392 U.S. 134 (1968). The Supreme Court directed the appeals court to reverse the district court judgment in full and to remand the case for trial. *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134 (1968).

26. Chief Justice Warren and Justices Douglas and Brennan joined in the opinion.

27. 392 U.S. at 138. Although this statement is true, it is equally true that there is nothing in the legislative history to indicate a congressional disapproval of the *in pari delicto* defense.

28. Although *in pari delicto* is often characterized as a common law defense, *see, e.g., id.* at 138, it is more properly identified as an equitable doctrine, *see Woolf v. S.D. Cohn & Co.*, 521 F.2d 225 (5th Cir. 1975), *vacated*, 426 U.S. 944 (1976); notes 12-13 *supra* and accompanying text.

29. 392 U.S. at 138. In theory, *in pari delicto* should never operate as a barrier to important public purposes because it is an equitable doctrine, *see note 28 supra*, originally promulgated to promote public policy in cases where the courts of law impeded it. *See generally* D. DOBBS, REMEDIES § 2.2 (1973).

30. 392 U.S. at 139.

31. *Id.* The plurality emphasized that recovery of a windfall gain by a culpable plaintiff would not necessarily encourage violations by others since wrongdoers remain susceptible to civil and criminal penalties for their conduct. It failed to consider, however, that this approach to antitrust enforcement might foster multiple lawsuits and inefficient use of the judicial system.

32. *Id.* at 140.

Black went on to discuss the relationship between the *Perma Life* parties, for his rationale was based at least in part on the fact that they were not equally culpable.³³ The plurality rejected defendants' attempt to depict the franchisees as "actively supporting the entire restrictive program as such, participating in its formulation and encouraging its continuation."³⁴ Noting that acquiescence in the conspiracy was the only way for plaintiffs to acquire Midas franchises and that many of the requirements imposed in the franchise agreement were, in fact, detrimental to their interests, the plurality characterized plaintiffs' participation in the conspiracy as less than fully voluntary.³⁵ Justice Black conceded that plaintiffs had profited from the conspiracy but stated that they should not be denied recovery for making "the best of a bad situation."³⁶ Significantly, however, he left open the possibility that genuinely voluntary and substantial participation might bar recovery: "We need not decide . . . whether such truly complete involvement and participation in a monopolistic

33. See *id.* at 140-41.

34. *Id.* at 140.

35. *Id.* at 139. The plurality emphasized the plaintiffs' unequal bargaining power, noting that the plaintiffs "cannot be blamed for seeking to minimize the disadvantages of the agreement once they had been forced to accept its more onerous terms as a condition of doing business." *Id.* at 140.

It is curious that the Court did not rely more heavily upon *Simpson v. Union Oil Co.*, 377 U.S. 13 (1964). In *Simpson*, plaintiff service station operator alleged that defendant's requirement that all service station lessees adhere to a "consignment" agreement that established fixed retail prices violated the Sherman Act. The Supreme Court, after depicting plaintiff as a "small struggling competit[o]r seeking retail gas customers," *id.* at 21, permitted the suit. The case has been cited as support for the proposition that a plaintiff coerced into anticompetitive conduct by economic pressures is not estopped from bringing suit against the instigator of the conspiracy. See, e.g., *Greene v. General Foods Corp.*, 517 F.2d 635, 647 (5th Cir. 1975), *cert. denied*, 424 U.S. 942 (1976).

There are two possible explanations for the plurality's failure to utilize the *Simpson* rationale. First, as Justice Harlan pointed out in *Perma Life*, the *Simpson* opinion never clearly stated whether the plaintiff had actually committed a forbidden act. *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 155 (1968) (Harlan, J., concurring in part and dissenting in part). Thus the relevance of *Simpson* to a case involving an admitted violator is unclear. Second, the Court may have deemed the *Perma Life* plaintiffs' participation more willful than that of *Simpson*. See *id.* at 139 (plurality opinion) ("They sought the franchises enthusiastically but they did not actively seek each and every clause of the agreement.") (emphasis added).

36. 392 U.S. at 140. Justice Marshall, however, pointed out that the provisions of the agreement requiring price maintenance and exclusive territories accrued primarily to the franchisees' benefit and argued that if the court determined that plaintiffs were responsible for the inclusion of these provisions, relief should be denied to the extent plaintiffs' claims for damages stemmed from their existence and enforcement. *Id.* at 149-50 (Marshall, J., concurring).

scheme could ever be a basis, wholly apart from the idea of *in pari delicto*, for barring a plaintiff's cause of action"³⁷

The significance of this apparent retreat from a total abolition of *in pari delicto* is enhanced by the fact that each of *Perma Life's* minority opinions stressed the importance of retaining some bar to recovery by a culpable plaintiff. Justice White, concurring in the result, agreed that *in pari delicto* "in its historic formulation" was not a useful concept for assessing a plaintiff's right to damages,³⁸ but contended that a bar to recovery would sometimes be necessary to prevent the promise of treble damages from encouraging conduct that the antitrust laws were designed to prevent.³⁹ According to Justice White, a party's right to recover should be contingent upon the following factors:

- [1] the relative responsibility for originating, negotiating, and implementing the [anticompetitive] scheme; . . . [2] who might reasonably have been expected to benefit from the provision or conduct making the scheme illegal; . . . [3] whether one party attempted to terminate the arrangement and encountered resistance or counter-measures from the other; . . . [4] who ultimately profited or suffered from the arrangement.⁴⁰

Justice White believed that by thus posing "the issue of causation in particularized form"⁴¹ the courts could ensure that recovery in antitrust litigation did not promote antitrust violations.

Justices Fortas and Marshall each separately concurred in the plurality opinion, arguing that the doctrine of *in pari delicto* should continue to play a limited role in civil antitrust litigation.⁴² Despite the potential deterrent effect of allowing all parties to sue without regard to fault, both Justice Fortas and Justice Marshall felt that "[t]he principle that a wrongdoer shall not be permitted to profit through his own wrongdoing"⁴³ makes it appropriate to deny recovery

37. *Id.* at 140. One commentator, noting this pronounced retreat from the plurality's purported abolition of the defense, remarked that "while there may be no *in pari delicto* defense in antitrust cases, according to the Supreme Court there is a defense which looks very much like what many of us used to call the *in pari delicto* defense." Millstein, *Current Status of Affirmative Defenses, Including the Passing-on Defense*, in *In Pari Delicto and Statutes of Limitations*, 38 ANTITRUST L.J. 111, 115 (1968).

38. 392 U.S. at 143 (White, J., concurring).

39. *Id.* at 146 (White, J., concurring). Justice White's opinion may be seen as an expansion of the views of the plurality: if *in pari delicto* is to be abolished, a new, similar defense should be developed to prevent recovery in cases of egregious plaintiff fault.

40. *Id.* at 146-47 (White, J., concurring).

41. *Id.* at 146.

42. *See id.* at 147 (Fortas, J., concurring); *id.* at 149 (Marshall, J., concurring).

43. *Id.* at 151 (Marshall, J., concurring); *see id.* at 148 (Fortas, J., concurring).

when the plaintiff's fault was substantially equal to the defendant's.⁴⁴ Moreover, they both agreed with Justice White that the supposed deterrent effect of the plurality rule might well be illusory because a complete abolition of *in pari delicto* could actually encourage anti-trust violations by holding out to violators the opportunity to recoup losses from coconspirators should their scheme go awry.⁴⁵

Justice Harlan, joined by Justice Stewart, concurred in part and dissented in part, arguing that although the lower courts had misused the doctrine, *in pari delicto* should be a permitted defense in antitrust cases.⁴⁶ Justice Harlan defined plaintiffs who are truly *in pari delicto* as "those who have themselves violated the law in cooperation with the defendant"⁴⁷ and contended that awarding them treble damages undermined antitrust enforcement and amounted to sanctioning "a principle of well-compensated dishonor among thieves."⁴⁸ Although critical of the inadequacy of lower court formulations of *in pari delicto*, Justice Harlan failed to indicate whether a plaintiff would be "cooperating" if guilty of only de minimis complicity or whether equal or greater than equal involvement would be required.⁴⁹

44. See *id.* at 149 (Marshall, J., concurring). In addition to equal fault, Justice Marshall would have required active participation by the plaintiff in the formation and implementation of the illegal scheme.

45. *Id.* at 151 (Marshall, J., concurring); see *id.* at 147 (Fortas, J., concurring). The plurality's suggestion that plaintiffs' profit from the illegal scheme might be offset against their losses, *id.* at 140, was rejected by Justice Marshall as rewarding, on an unnecessarily speculative basis, an undeserving party simply because his injuries outweighed his benefits. *Id.* at 152 (Marshall, J., concurring).

46. *Id.* at 153 (Harlan, J., joined by Stewart, J., concurring in part and dissenting in part).

47. *Id.* This definition did not encompass plaintiffs who (1) knowingly dealt with defendant violators but did not join them; (2) engaged in anticompetitive activity that provoked independent activity for which they sued defendant; or (3) were coerced into joining in defendant's illegal conduct. *Id.* at 154-55 (Harlan, J., concurring in part and dissenting in part).

Justice Harlan did not elaborate upon these exceptions, and thus the scope of the proposed coercion defense is unclear. The defense derives from *Simpson v. Union Oil Co.*, 377 U.S. 13 (1964), but Justice Harlan never explicitly discussed whether the defense should be allowed when, as apparently was the case in *Perma Life*, plaintiffs are free to seek a franchise with another firm if they do not want to join in the defendants' illegal conduct. Although neither *Simpson* nor *Perma Life* stated that a coercion defense is possible under such circumstances, their holdings apparently operate jointly to sanction the rule that a franchisee's participation in anticompetitive practices, simply to obtain a franchise, will not itself defeat the franchisee's subsequent antitrust suit.

48. 392 U.S. at 154 (Harlan, J., concurring in part and dissenting in part).

49. Since the complex record before the Court did not disclose whether the plaintiffs' conduct violated the suggested standard, Justice Harlan urged that the case be remanded to the trial court for reconsideration of defendants' motion for summary judgment. *Id.* at 153, 156 (Harlan, J., concurring in part and dissenting in part).

The five separate opinions in *Perma Life* created serious doubts about the status of *in pari delicto*. The plurality opinion began the confusion by stating, apparently without equivocation, that the defense is "not to be recognized" in a civil antitrust action,⁵⁰ only to intimate immediately thereafter that if a plaintiff were truly of equal or greater culpability his action might be barred.⁵¹ Justice White further obscured the issue by agreeing that *in pari delicto* should be eliminated but proposing that fault be used as a basis for dismissing suits in which antitrust goals would otherwise be frustrated.⁵² The four remaining Justices disagreed on particulars but unanimously urged retention of the *in pari delicto* defense in its traditional form.⁵³ Thus, when lower courts had to assess defense motions for dismissal on *in pari delicto* grounds, they could not confidently turn to the Supreme Court for guidelines.

B. LOWER COURT INTERPRETATIONS OF *Perma Life*

In interpreting *Perma Life*, the lower courts have attempted to adhere to its "holding"⁵⁴ by focusing on the degree to which the plain-

50. *Id.* at 140.

51. *See id.*; notes 33-37 *supra* and accompanying text.

52. 392 U.S. at 143-47 (White, J., concurring).

53. *Id.* at 147 (Fortas, J., concurring); *id.* at 149 (Marshall, J., concurring); *id.* at 153 (Harlan, J., joined by Stewart, J., concurring in part and dissenting in part).

54. To the extent it is discernible amid the confusion, the "holding" of *Perma Life* appears to be that the defense of *in pari delicto* will be available only to a defendant whose fault is less than the plaintiff's. *But see* note 147 *infra*. Two factors support this interpretation. First, the *Perma Life* plaintiff was less culpable than the defendant, and the defense of *in pari delicto* was disallowed. Second, at least five Justices—White, Harlan, Stewart, Marshall, and Fortas—were clearly reluctant to permit treble damage awards to seriously culpable plaintiffs. Moreover, Justice Black's backtracking in the plurality opinion, *see* note 37 *supra* and accompanying text, seems to support the proposition that the entire Court felt the need to bar recovery to some plaintiffs who were seriously at fault. Thus, under *Perma Life* recovery will at least be allowed where the defendant is more culpable than the plaintiff.

There remains, however, the important question of the availability of recovery where the culpability of the parties is approximately equal. There are indications, both in *Perma Life* and in the opinions of most lower courts following it, that a plaintiff in a situation of equal culpability should not be allowed to recover. *See, e.g., Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 140 (1968) (plurality opinion); *id.* at 146 (White, J., concurring); *id.* at 147 (Fortas, J., concurring); *Columbia Nitrogen Corp. v. Royster Co.*, 451 F.2d 3, 16 (4th Cir. 1971); *Premier Electrical Constr. Co. v. Miller-Davis Co.*, 422 F.2d 1132, 1138 (7th Cir.), *cert. denied*, 400 U.S. 828 (1970). Nevertheless, the question was explicitly reserved in *Perma Life*, *see* text accompanying note 37 *supra*, and, as will be pointed out below, so long as the goal remains maximization of deterrence, a plaintiff of equal fault *should* be allowed to recover his damages. *See* note 127 *infra* and accompanying text. The language of the above cited cases notwithstanding, therefore, it would appear that *in pari delicto* is only appropriate in cases where the plaintiff is more at fault than the defendant. *See generally*

tiff was at fault. Thus, most courts have agreed that plaintiffs who are substantially less culpable than defendants should not be barred from recovery.⁵⁵ In *Greene v. General Foods Corp.*,⁵⁶ for example, the court disallowed the defense, focusing on the plaintiff's bargaining power and the extent of his participation in the illegal conduct. Plaintiff had sued for treble damages after defendant terminated the plaintiff's distributorship for failure to abide by an illegal retail price maintenance scheme. The court found that plaintiff (1) was not involved in the creation of the conspiracy, (2) did not participate in the fixing of prices, and (3) had greatly inferior economic bargaining power.⁵⁷ Under these circumstances, the court stated, imposition of *in pari delicto* would "thwart the enforcement of the antitrust laws."⁵⁸

Conversely, courts have permitted the defense of *in pari delicto* when the plaintiff was of equal or greater fault.⁵⁹ In *Dreibus v. Wilson*,⁶⁰ plaintiffs and defendants formed a corporation to administer a contract with a fabric mill that granted plaintiffs' company an exclusive distributorship for a fabric in short supply in the United States. Defendants gained control of the corporation, allowed the

Javelin Corp. v. Uniroyal, Inc., 546 F.2d 276 (9th Cir. 1976), *cert. denied*, 431 U.S. 938 (1977); *American Motor Inns, Inc. v. Holiday Inns, Inc.*, 365 F. Supp. 1073, 1098 (D.N.J. 1973) (dictum), *aff'd in part, rev'd in part, vacated in part*, 521 F.2d 1230 (3d Cir. 1975); *Morton v. National Dairy Prod. Corp.*, 287 F. Supp. 753, 765 (E.D. Pa. 1968) (dictum), *aff'd per curiam*, 414 F.2d 403 (3d Cir. 1969), *cert. denied*, 396 U.S. 1006 (1970).

55. See, e.g., *Sahm v. V-1 Oil Co.*, 402 F.2d 69 (10th Cir. 1968) (*in pari delicto* would not bar service station lessee's suit alleging Sherman Act violations stemming from defendant's requirement that lessee sign a resale price maintenance agreement as a condition of the lease); *Lanier Business Prod. v. Graymar Co.*, 355 F. Supp. 524 (D. Md. 1973) (defendants' counterclaims for antitrust violations allowed because the defendants lacked equal responsibility for the injuries suffered; in such cases, degree of fault is relevant only to computation of damages). Although *Lanier* is in line with the majority of lower court opinions in terms of its outcome, the standard it adopted is illustrative of the lack of clarity in the courts' rationales for allowing or disallowing *in pari delicto*: antitrust policy would not be served by permitting recovery to a party "responsible for the lawlessness in question." *Id.* at 527.

56. 517 F.2d 635 (5th Cir. 1975), *cert. denied*, 424 U.S. 942 (1976).

57. *Id.* at 646-47. The *Greene* court recognized that these three factors made the case factually similar to *Simpson v. Union Oil Co.*, 377 U.S. 13 (1964), and ruled that "[o]n the authority of *Simpson* and *Perma Life*" plaintiff would not be barred. 517 F.2d at 647. Thus, the court found it unnecessary to determine explicitly whether plaintiff was coerced or simply acquiesced in defendant's illegal conduct. See note 47 *supra*.

58. 517 F.2d at 647.

59. See, e.g., *Premier Electrical Constr. Co. v. Miller-Davis Co.*, 422 F.2d 1132, 1138 (7th Cir.), *cert. denied*, 400 U.S. 828 (1970); cf. *Skouras Theatres Corp. v. Radio-Keith-Orpheum Corp.*, 58 F.R.D. 357, 360 (S.D.N.Y. 1973) (evidence presented on motion inadequate for summary judgment based on equal culpability).

60. 529 F.2d 170 (1975).

contract to lapse, and then negotiated a new contract with the mill for their own benefit. Plaintiffs brought a derivative suit alleging that defendants' creation of an exclusive distributorship violated the Sherman Act. The trial court, conceding that exclusive distributorships could constitute a restraint of trade, dismissed the action for failure to state a claim upon which relief could be granted because plaintiffs, as "the originating, active persons responsible for [the conspiracy's] establishment,"⁶¹ evinced a degree of involvement in illegality great enough to warrant dismissal under *Perma Life*.⁶²

The apparent agreement among the lower courts that degree of culpability is to be the basis of allowing or disallowing the defense of *in pari delicto* masks very real differences over how culpability should be determined. In *Javelin Corp. v. Uniroyal, Inc.*,⁶³ for example, plaintiff sued an organization that had been formed by tire distributors to increase their market power by purchasing a quota of tires from Uniroyal and limiting sales to assigned, exclusive areas. Although plaintiff had eagerly sought entrance to the cartel and, while a member, had become one of the largest tire distributors in the United States, the court permitted the plaintiff's suit because it could not be said that the "illegal conspiracy would not have been formed *but for* the plaintiff's participation."⁶⁴ Thus, the *Javelin* court's assessment of culpability rested solely upon the parties' involvement in the initiation of illegal activity.⁶⁵ On the other hand, some courts have used a much broader test of fault. In *Columbia Nitrogen Corp. v. Royster Co.*,⁶⁶ a breach of contract action wherein defendant asserted an antitrust defense based on plaintiff's alleged reciprocal dealing, the court stated its *in pari delicto* test as follows: "when parties of substantially equal economic strength mutually participate in the formulation and execution of the scheme and bear

61. *Id.* at 174 (quoting district court opinion).

62. *Id.*

63. 546 F.2d 276 (9th Cir. 1976), *cert. denied*, 431 U.S. 938 (1977).

64. *Id.* at 279 (emphasis added).

65. By focusing on the formation of illegal conspiracies, the *Javelin* court may have placed disproportionate weight upon what should more properly be only one factor in a determination of culpability since a more expansive examination of all the relevant evidence might have produced a contrary result. For a discussion of other factors to be considered, see text accompanying note 40 *supra*; pp. 84-86 *infra*.

An alternative interpretation of the *Javelin* opinion, however, is that plaintiff's lack of involvement in the conspiracy's formation may have been sufficient to render its otherwise extensive involvement approximately equal to that of the defendants who had initiated the scheme. If this were the case, *Javelin* would apparently be the only instance where plaintiff and defendant fault was found to be in equipoise. In such a case, disallowance of *in pari delicto* is proper. See note 54 *supra*; note 127 *infra* and accompanying text.

66. 451 F.2d 3 (4th Cir. 1971).

equal responsibility for the consequent restraint of trade, each is barred"⁶⁷

C. SHORTCOMINGS IN JUDICIAL ANALYSIS

As the foregoing discussion demonstrates, the defense of *in pari delicto* remains available, despite Justice Black's admonition that it is "not to be recognized" as a defense in antitrust law. Rather than rejecting the defense in toto, the lower courts appear to be developing a doctrine that permits recovery only when the party seeking it is less culpable than its opponent.⁶⁸ Unfortunately, however, the lower courts so far have neither articulated a comprehensive definition of culpability nor standardized their assessment of *in pari delicto* claims.⁶⁹ Their reliance upon culpability as the appropriate test is a logical extension of *Perma Life*, however, and it may therefore be inferred that the Supreme Court's own failure to define culpability contributed significantly to this shortcoming.

Besides the lack of consistency, there is another, more serious problem inherent in the position the lower courts have adopted, and, again, its origin lies in *Perma Life*. Clearly, abolishing the *in pari delicto* defense has the inevitable consequence of allowing a plaintiff to recover damages for illegal conduct in which he has been a significant participant. The implicit assumption made by the *Perma Life* plurality was that a supposed increase in deterrence outweighs the ethical incongruity of allowing a wrongdoer to profit through his own wrongdoing.⁷⁰ Even if such an assumption is warranted,⁷¹ it is clear

67. *Id.* at 15-16. A number of other tests of culpability have been used by the courts. See, e.g., *South-East Coal Co. v. Consolidation Coal Co.*, 434 F.2d 767, 784 (6th Cir. 1970) (suggesting a test looking to initiation and continuing involvement in illegality, without any indication of a need to examine the respective bargaining power of the parties), *cert. denied*, 402 U.S. 983 (1971); *Premier Electrical Constr. Co. v. Miller-Davis Co.*, 422 F.2d 1132, 1138 (7th Cir.) ("[P]laintiffs who do not bear equal responsibility for creating and establishing an illegal scheme, or who are required by economic pressure to accept such an agreement, should not be barred"), *cert. denied*, 400 U.S. 828 (1970). See also *American Motor Inns, Inc. v. Holiday Inns, Inc.*, 365 F. Supp. 1073, 1098 (D.N.J. 1973) (gauging a franchisee's culpability by asking whether it instigated the conspiracy and was "more forceful in asserting its rights under the [anticompetitive] franchise agreement than any other franchisee"), *aff'd in part, rev'd in part, vacated in part*, 521 F.2d 1230 (3d Cir. 1975).

68. This doctrine has not been universally applied. See notes 63-67 *supra* and accompanying text.

69. Justice White proposed a broad test of culpability in his *Perma Life* concurrence. 392 U.S. at 146-47. Because this test was simply one of the many suggested approaches to the defense proposed in the decision's minority opinions, it is not surprising that the lower courts have not acknowledged or relied upon his formulation.

70. See *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 139 (1968). See generally *id.* at 151 (Marshall, J., concurring).

71. Justice Marshall's statement that "[t]he principle that a wrongdoer shall

that the appropriate role of *in pari delicto* can only be defined by determining whether its abolition or its retention would have the greater deterrent effect on anticompetitive activity.⁷² There are two questions relevant to such an inquiry:

(1) If *in pari delicto* is abolished, will the potential anti-trust violator be deterred from illegal behavior by the knowledge that he is susceptible to suit by his coconspirators?

(2) If the defense is available, will the potential violator be deterred by the knowledge that, if his anticompetitive scheme produces loss instead of profit, remedial action against his coconspirators is barred?

The *Perma Life* opinions simply assumed the answers to these questions. Justice Black limited *in pari delicto* in order to deter potential violators with the threat of civil action.⁷³ Justice White, although concurring in the abolition of the defense, argued that if there were no bar to recovery potential violators would have a "can't lose" opportunity: either they would reap illicit profits or they would recoup their losses via treble damage suits against coconspirators.⁷⁴ The remaining opinions echoed Justice White's theory of counter-deterrence and urged preservation of the *in pari delicto* doctrine in limited form.⁷⁵ Thus, both the Supreme Court's proponents and

not be permitted to profit through his own wrongdoing is fundamental in our jurisprudence," *id.* at 151, demonstrates that this assumption is still a matter of controversy. Nevertheless, the bulk of relevant case law treats private antitrust enforcement as a policy goal of such importance that it warrants disregarding general equitable doctrines. See, e.g., *id.* at 138-39. Because equity evolved to promote fairness when common law rules produced unjust results, this position appears to be sound. See generally D. DOBBS, *supra* note 29, § 2.2. Since in this instance the legal remedies produce just results by promoting competition, modern courts should not apply the equitable doctrine of *in pari delicto* with such rigidity that it would defeat this public policy goal. See note 29 *supra* and accompanying text.

72. Commentators have generally agreed with this approach to *in pari delicto*. Their arguments for or against use of the doctrine, however, tend to be conclusory and ignore the need for a careful analysis of the deterrent effect of the defense in any given case. Compare Note, *Rethinking In Pari Delicto: An Antitrust Policy Analysis*, 3 FLA. ST. U.L. REV. 360, 373 (1975) ("Although the question is not susceptible of empirical proof, it seems unrealistic to argue that a potential conspirator, contemplating illegal business dealings, seriously considers whether legal redress from his coconspirators will be available should the enterprise fail."), with Ellis, *In Defense of In Pari Delicto*, 56 A.B.A.J. 346, 348 (1970) ("[P]arties in an equal fault situation . . . are less likely to be concerned about being sued since the premise of the bargain is mutual benefit. . . . [They] are more likely to be deterred by the knowledge that if matters later turn sour for them the defense of *in pari delicto* will preclude any attempt to recover any loss.").

73. See *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 139 (1968).

74. *Id.* at 146 (White, J., concurring).

75. See text accompanying notes 42-49 *supra*.

opponents of *in pari delicto* purported to "support" their positions with the unsupported pronouncement that their particular position was necessary for deterrence.

At the heart of the Court's lack of consensus was a failure to recognize or discuss those factors that go to the essence of deterrence. Each of the *Perma Life* opinions voiced the assumption that an egregious wrongdoer in any conspiracy should not be permitted to recover from lesser participants because counterdeterrence would result. In other words, the wrongdoer would actually be encouraged to break the law. This assumption may not prove accurate in practice. It is based on the premise that avoiding reward to significant wrongdoers is synonymous with promoting deterrence of significant wrongdoing. But the link between culpability and susceptibility to deterrence is not apparent because culpability stems from *past* actions in a particularized setting, while susceptibility to deterrence depends upon the nature and tendencies of an individual or entity as they affect attempts to plan future activity. Thus, although culpability and susceptibility to deterrence may be related concepts,⁷⁶ they are not synonymous. By failing to articulate explicitly or perhaps even recognize this distinction, the Supreme Court greatly confused the *in pari delicto* issue and inhibited the deterrent effect that application of the defense should promote.

The lower courts compounded this problem by adhering to *Perma Life's* emphasis on culpability as the benchmark of *in pari delicto* availability, instead of making independent inquiry into the best means to promote deterrence or scrutinizing the assumed deterrence-culpability nexus. In *Greene v. General Foods Corp.*,⁷⁷ the Fifth Circuit found the plaintiff's fault unequal to the defendant's and proceeded to disallow the defense with only the terse comment that allowing its use would "thwart the enforcement of the antitrust laws."⁷⁸ Meanwhile, in *Dreibus v. Wilson*,⁷⁹ the First Circuit found sufficient culpability and permitted the application of the defense without any reference to the Supreme Court's disparate viewpoints on deterrence.⁸⁰ By basing the decision of whether to permit recovery on the parties' fault, the courts are institutionalizing a standard that bears only a haphazard relationship to deterrence and is therefore not an optimal means of achieving antitrust goals.

76. See note 115 *infra*.

77. 517 F.2d 635 (5th Cir. 1975), *cert. denied*, 424 U.S. 942 (1976). See text accompanying notes 56-58 *supra*.

78. 517 F.2d at 647.

79. 529 F.2d 170 (1st Cir. 1975). See text accompanying notes 60-62 *supra*.

80. 529 F.2d at 174.

III. THE UNDERLYING THEORY OF *IN PARI DELICTO*

A. INCENTIVES AND DISINCENTIVES TO ILLEGAL CONDUCT

To determine the appropriate role of *in pari delicto* in maximizing deterrence of anticompetitive conduct, it is necessary to examine why businesses engage in such behavior. Although the goal of almost all illegal corporate activity is profit,⁸¹ not all profit-seeking businesses behave illegally. This fact probably reflects a balancing by businesses of the traditional incentives and disincentives to anticompetitive conduct that make such conduct both attractive and dangerous.⁸²

Antitrust violations result in part from the interrelated effects of market⁸³ and intracompany pressure.⁸⁴ Although statements that describe anticompetitive conspiracy as "the only way a business can be run" or as "free enterprise"⁸⁵ are self-serving exaggerations, trade

81. Cf. Lane, *Why Businessmen Violate the Law*, in WHITE COLLAR CRIMINAL 88, 101 n.1 (G. Geis ed. 1968) ("Though there are some cases where the law is difficult to obey, these seem to me to be relatively few as compared to those in which it is merely more profitable not to obey.") (quoting Corwin Edwards, Director, Bureau of Industrial Economics, Federal Trade Commission).

82. This balancing process is illustrated by the experience of the General Electric Company, which in the 1950's served as a battleground for two opposing philosophical positions on the proper role of competition in big business. One group within the company, perhaps influenced by thirteen antitrust suits in which the company had been involved in the 1940's, believed that the success of a business enterprise hinged on its competitive independence. A sizable second group thought that competition was "for the birds" and that it was "less wearing to take turns on rigged bids than to play the rugged individualist." Smith, *The Incredible Electrical Conspiracy*, *FORTUNE*, April 1961, at 132, 135. As General Electric's central role in the conspiracies indicates, the latter group ultimately prevailed. See note 85 *infra*.

These conflicting positions are illustrated by the story of General Electric's Vice President, George Burens, an earnest believer in competition, who, after witnessing a \$176 million drop in the company's sales in 1954 and extensive price cuts in 1954-1955, called a subordinate into his office and ordered him to "crank up . . . the old cartel." Smith, *supra*, at 172.

See also "John Q. Lawyer," *How to Conspire to Fix Prices*, *HARV. BUS. REV.*, March-April 1963, at 95, 101 (a tongue-in-cheek guide to the fledgling conspirator that advises: "[I]f you are getting more than you would have gotten, stay in; if you are not, get out.") (emphasis in original).

83. See Smith, *supra* note 82, at 135.

84. See C. BANE, *THE ELECTRICAL CONSPIRACY CASES: THE TREBLE DAMAGE ACTIONS 27-28* (1973); E. SUTHERLAND, *WHITE COLLAR CRIME 234-56* (1949).

85. Smith, *supra* note 82, at 133. A problem inherent in any attempt to identify the motivation behind anticompetitive conduct in order to determine the factors that promote deterrence is the violators' unwillingness to discuss their own motives. Investigators, however, have gathered extensive information on motivations behind anticompetitive practices from corporate executives involved in violations in the "electrical conspiracy cases," one of the largest antitrust litigations in history, in which criminal actions were brought against 29 corporations and 45 corporate executives for fixing prices, rigging bids, and dividing the market on electrical equipment.

violations occur frequently enough to suggest that, despite its risks, anticompetitive conduct may in some cases be a "normal" business strategy.⁸⁶ Insofar as one business entity realizes increased profit from its illegal activity,⁸⁷ the pressure upon rival businesses to match those gains is intensified and may outweigh the perceived importance of operating within the antitrust laws.⁸⁸ A General Electric executive implicated in a major government antitrust prosecution⁸⁹ stated that the cause of his company's wrongdoing was pressure to perform: "All we got . . . was 'get your percentage of available business up, the General Electric Company is slipping.'"⁹⁰ Thus, the pressures of competition in a marketplace in which antitrust violations have already occurred tend to produce a managerial emphasis on profit at any price,⁹¹ which intensifies intracompany demands for maximum gain and may make further anticompetitive conduct inevitable.

Thousands of additional civil actions followed, see *Wall St. J.*, Jan. 18, 1972, at 1, col. 6, most brought under section 5 of the Clayton Act. The criminal trials resulted in 7 jail sentences, 24 suspended jail sentences, and fines totaling \$1.8 million. The civil actions cost General Electric alone about \$200 million to settle. *Id.*

This Note will draw heavily upon investigative materials from these cases. Although these cases are obviously distinguishable from the "average" antitrust case because of their scope, it is likely that all anticompetitive activity is motivated, to some degree, by considerations similar to those revealed in the "electrical conspiracy cases." See notes 81-84 *supra*.

86. In 1971, the Nader Study Group on Antitrust Enforcement released the results of a questionnaire distributed to the presidents of *Fortune's* 1000 largest manufacturing corporations. The findings revealed that 49.1% of the cooperating members of *Fortune's* top 500 had been involved in antitrust litigation in the preceding five years. See M. GREEN, *THE CLOSED ENTERPRISE SYSTEM* app. B (1971). Because only eleven percent of the solicited corporations responded, however, these results must be treated with caution.

87. It is evident that even antitrust violations that are exposed and successfully litigated may still produce profit to the offender. See note 95 *infra*.

88. Competitors may also attempt to improve their relative position by supplying information about their rival's illegal activity to the Justice Department. Government-initiated antitrust actions, however, are selective and infrequent, see notes 2-6 *supra* and accompanying text, and, even when successful, may not make otherwise profitable activities unattractive or diminish an illegally acquired share of the market, see note 95 *infra*. Moreover, the chief motivation of all businesses is profit, not law enforcement. Gains by rivals may therefore motivate attempts to increase profits through illegality rather than through competition.

89. This was one of the "electrical conspiracy cases," discussed at note 85 *supra*. See generally C. BANE, *supra* note 84.

90. Smith, *supra* note 82, at 170. According to Clarence Bule, a General Electric executive, "[W]e . . . had no trouble getting the most innocent persons to go along. . . . [I]f they didn't want to do it, they knew we would replace them." *Id.* at 137. See also E. SUTHERLAND, *supra* note 84, at 234 (suggesting a "hypothesis of differential association" under which illegal conduct in the business world is reinforced when executives become insulated from vigorous opponents of illegality).

91. See Smith, *supra* note 82, at 170, 172.

Although such market and intracompany pressures for profit maximization are strong incentives to illegal conduct, other factors will often offset them and deter violations. The most basic, and indeed the most frequently cited, reason for antitrust compliance is a desire to obey the law.⁹² This desire may stem from a sense of morality, but it may also be based on a number of more selfish considerations. Treble damages⁹³ and fines,⁹⁴ for example, have been cited as strong disincentives to illegal conduct, and for small or financially insecure businesses they may be highly effective. A growing body of data suggests, however, that such penalties may often be ineffective as deterrents.⁹⁵ Another traditionally cited disincentive to illegal conduct is adverse publicity.⁹⁶ Public notoriety may diminish a violator's business stature, decrease the desirability of that business as an investment, or prompt legislation forcing the offender to change its operations.⁹⁷ The impact of adverse publicity depends in part, however, upon society's perception of, and willingness to invest in and support, antitrust violators. Although the antitrust laws represent a strong public policy favoring competition,⁹⁸ violation of those laws may not be viewed as being immoral;⁹⁹ thus, public reaction may

92. See M. GREEN, *supra* note 86, at app. B.

93. See, e.g., *id.*; Wall St. J., Jan. 18, 1972, at 1, col. 6.

94. See, e.g., M. GREEN, *supra* note 86, at app. B.

95. It has been persuasively argued that the threat of treble damages is largely illusory. See, e.g., Wheeler, *Antitrust Treble-Damage Actions: Do They Work?*, 61 CALIF. L. REV. 1319 (1973). Several significant factors lend support to this position. First, many potential plaintiffs simply do not sue because the statute of limitations, Clayton Act §4b, 15 U.S.C.A. §15(b) (West Supp. 1977), has run. In addition, the costs of private litigation if the defendant prevails may be prohibitive, and, absent an "insider's" access to evidence, problems of proof may exist. See Wheeler, *supra*, at 1330. Second, even if the plaintiff is awarded final judgment at trial, the consequences to the violator will rarely be devastating. Because interest is not payable on treble damage awards, the defendant enjoys the free use of his illicit profits until suit is brought and the lengthy litigation concluded. See *id.* at 1323. See generally Parker, *Treble Damage Action—A Financial Deterrent to Antitrust Violations?*, 16 ANTITRUST BULL. 483, 486-92 (1971). Moreover, the sum that is finally paid in satisfaction of the judgment is fully deductible in computing taxable income, unless the defendant was convicted or pled guilty or *nolo contendere* in a criminal action either before or after the commencement of the civil suit, in which case one-third is still deductible. See I.R.C. § 162(g); Treas. Reg. § 1.162-22 (1972). Thus, net damages may actually be less than illegal profits.

That fines cannot be a compelling deterrent to illegality is indicated both by the relative handful of prosecutions initiated by the government each year, see notes 2-6 *supra* and accompanying text, and, at least as to major corporate violators, by the ceiling of \$1,000,000 on fines imposed by statute.

96. See generally Anderson, *Effective Antitrust Compliance Programs and Procedures*, 1 CORPORATE COUNSEL INSTITUTE PROCEEDINGS 36, 37 (1962).

97. *Id.*

98. See note 1 *supra*.

99. See, e.g., Smith, *supra* note 82, at 135 (defendants knew they had broken the

cause no significant long-term diminution in an offender's sales or desirability as an investment.¹⁰⁰ Another deterrent to illegal conduct is the threat of imprisonment for business executives.¹⁰¹ In egregious cases, imprisonment is more than a theoretical possibility,¹⁰² and its potential for deterrence should not be overlooked.¹⁰³ Because it is used so sparingly, however, the threat of imprisonment as a sanction has generally proved more illusory than real.¹⁰⁴

These disincentives undoubtedly deter many corporations from engaging in illegal conduct. Nevertheless, antitrust violations continue, and it is evident that for some firms the lure of windfall profits often outweighs the dangers of the traditional disincentives. Consequently, it is reasonable to infer that the decision whether or not to violate the antitrust laws will often turn upon other, perhaps more basic, considerations.

The most fundamental goal of both the management executive and the business that he operates is survival: the indispensable condition precedent to power, autonomy, and financial reward.¹⁰⁵ For a business entity, survival requires earnings, and ultimately profits, sufficient to prevent a withdrawal of capital and permit a maintenance level of reinvestment without incurring excessive debt.¹⁰⁶ To

law but felt they had not acted unethically); Wheeler, *supra* note 95, at 1334-35. *But see* M. GREEN, *supra* note 86, at app. B (84.6% of top 500 and 60.4% of next 500 corporation presidents responding disagreed with the statement that price-fixing in the electrical conspiracy cases, *see* note 85 *supra*, was illegal but not immoral).

100. On August 7, 1960, General Electric common stock closed at 81 3/8. Wall St. J., Aug. 8, 1960, at 22, col. 2. Six months later, after sentencing was completed in the electrical conspiracy cases, *see* note 85 *supra*, it closed at 68 1/2, Wall St. J., Feb. 8, 1961, at 22, col. 3, but by February 1962 it had rebounded to 75, Wall St. J., Feb. 8, 1962, at 22, col. 3.

101. *See* M. GREEN, *supra* note 86, at app. B.

102. *See* note 85 *supra*.

103. "Business school professors agree that the price-fixing case, which resulted in the jailing of several executives, . . . has had a greater impact on their students than any other incident in recent years." N.Y. Times, Mar. 12, 1961, § 3, at 1, col. 2.

104. *See* Posner, *supra* note 4, at 389, 391; Wheeler, *supra* note 95, at 1320. Of 54 criminal actions instituted in 1975 and 1976, only four produced nonsuspended jail sentences (of from ten to sixty days) for any of the defendants. *See* [1977] 4 TRADE REG. REP. (CCH) ¶¶ 45,075-76.

105. *See* J. GALBRAITH, THE NEW INDUSTRIAL STATE 167 (2d rev. ed. 1971). Galbraith argues that in the modern corporation survival means preservation of authority by the "technostructure," an imperfectly defined group that makes major decisions for the corporate body. *Id.* at 70-71, 167. This is a consideration that pressures even top management personnel. According to Smith, *supra* note 82, at 172, 180, the incoming general manager of General Electric's Switchgear Division was told that his job would be "at risk" for two years: "If he performed, he could keep it and become a vice president If he was found wanting, he wouldn't be able to go back to his old job. He'd just be out. [He] promptly joined the . . . conspiracy."

106. *See* J. GALBRAITH, *supra* note 105, at 167-68. To the extent that earnings fall

ensure his personal survival, the managerial executive must therefore preserve minimally acceptable earnings by guarding his firm's base-line profit. For firms on the borderline of profitability, this may mean "put[ting] prevention of loss ahead of maximum return."¹⁰⁷ Accordingly, managers of such firms will tend to be risk averse, and thus to them the traditional incentives and deterrents to anticompetitive conduct will acquire special significance.¹⁰⁸

Although it is possible for some firms to violate the antitrust laws and to sustain serious penalties while emerging with an increased profit ratio and market share,¹⁰⁹ management teams who see their firms as being on the borderline of profitability may nevertheless conclude that they cannot risk exposure to the adverse effects of being found in violation of the antitrust laws. This risk aversion is likely to persist even though an illegal windfall could lessen their concern about their own survival. The desirability—in terms of survival—of increased revenue for the borderline firm is therefore negated by the importance of eluding disastrous antitrust liability.¹¹⁰ Thus, the insecurity of management renders the traditional deterrents to illegality more effective for such firms.

Under different business circumstances, however, the managerial emphasis on personal security may also provide the ultimate motive for antitrust violations. Once a minimum level of earnings has been firmly established, survival becomes less of a concern, and the primary goals of business management become increased profits and growth.¹¹¹ Profits and growth not only directly benefit the business

below this minimally acceptable level, management may be forced to sacrifice its desire for power and autonomy in order to ensure adequate cash flow. If earnings seriously decline, management may actually be forced out. *See id.* at 168.

107. *Id.*

108. *See* Breit & Elzinga, *Antitrust Penalties and Attitudes Toward Risk: An Economic Analysis*, 86 HARV. L. REV. 693, 705 (1973). The individuals running a business need not be conscious of the fact that they fall within one category or the other for their behavior to conform to the model. Indeed, an unstable economy may cause some firms to fluctuate from one category to the other. Rather, it is the financial health of an entity that causes aggressive or protective behavior, and the firm's managers will exhibit aversiveness or not in accordance with the firm's economic well-being at the time.

109. *See generally* notes 93-104 *supra* and accompanying text.

110. *See* J. GALBRAITH, *supra* note 105, at 169. Notwithstanding the general inefficiency of private antitrust litigation as a recovery device for the plaintiff, peripheral effects of private litigation may be devastating. In 1969, four franchisees of Shakey's Co. brought suit alleging injury from Shakey's requirement that all spices used in franchise operations be purchased from the franchisor. This action was settled out of court for \$200,000, but pending resolution of the suit, the company's sale of franchises virtually ceased for one year, its growth was stifled, and its earnings were reduced sharply. *See* Shaffer, *New Trustbusters*, Wall St. J., Jan. 18, 1972, at 1, col. 6.

111. *See* J. GALBRAITH, *supra* note 105, at 171-72.

entity, they also indirectly benefit individual executives: profits foster expansion; expansion fosters increased personal responsibility, promotions, salary increases, and other personal gains.¹¹² The sophisticated executive of a firm operating well above the level of minimally acceptable profits may therefore conclude that the potential for disaster from anticompetitive conduct is so slight, and the potential gains—both business and personal—are so substantial, that violations are worth the risks.¹¹³ For firms in such a position, the traditional penalties for antitrust violation are minimally effective as deterrents.

Susceptibility to deterrence, therefore, is a function of specific characteristics of the firm's economic strength and the effect of those characteristics on the manner in which the firm's executives approach risk. A judicial decision on whether to allow the assertion of the *in pari delicto* defense that purports to be governed primarily by the effect it will have on deterrence must therefore be based on an examination of those characteristics. The courts have failed to do this, relying rather on a generalized sense of culpability.¹¹⁴ While it may be that the approach taken by the courts has more often than not led to a correct result,¹¹⁵ the absence of any necessary connection between culpability and risk aversiveness inevitably tends to make the decisions somewhat haphazard, inconsistent, and lacking in any convincing rationale.¹¹⁶ It is the purpose of the final sections of this Note, first, to define those situations where, given the theory of deterrence set out above, the defense ought and ought not to be allowed in order to maximize deterrence and, second, to articulate factors that will aid the courts in judging when a particular firm is or is not risk averse.

112. See *id.* at 171; R. MARRIS, *THE ECONOMIC THEORY OF 'MANAGERIAL' CAPITALISM* 102 (1964).

113. See M. GREEN, *supra* note 86, at 1083; notes 83-91 *supra* and accompanying text. See generally J. GALBRAITH, *supra* note 105, at 176.

114. See notes 68-80 *supra* and accompanying text.

115. Generally, the more culpable firm is the one whose involvement or participation in the conspiracy is greater. By and large the major participants in a conspiracy will be risk taking firms, for they are the only firms that voluntarily undertake illegal activity. See notes 111-13 *supra* and accompanying text. Similarly, the risk averse firms, because they rarely enter upon illegal activity voluntarily, see notes 105-10 *supra* and accompanying text, will usually be relatively minor participants. Unfortunately this relationship between participation or culpability and risk aversiveness is purely coincidental. It is relatively clear, for instance, that an aggressive, risk taking firm might well play a minor role in a particular conspiracy. It is just such a firm that we most want to deter, but an analysis based on culpability might well indicate that it should be allowed to assert the defense (if it is being sued) or recover (if it is suing).

116. See text accompanying notes 77-80 *supra*.

B. MAXIMIZING DETERRENCE

As indicated above, the world of potential antitrust violators may be divided into two classes: firms that, because of their ability to withstand antitrust liability without significantly endangering their continued existence, are willing to risk such liability in order to increase profits¹¹⁷ (the "risk taking firms") and firms that, because of their marginal profit position, cannot afford such risks because of the potential threat that antitrust liability poses to their survival¹¹⁸ (the "risk averse firms"). At the outset it is clear that, although neither class should be gratuitously encouraged to violate the law, deterrence efforts should be directed primarily at the risk taking firms. These firms are prime candidates to play a major role in anti-competitive activities because the illegality offers an excellent opportunity to reap windfall profits without a potential for loss substantial enough to threaten their existence.

As is illustrated by the difficulties that the Supreme Court had in *Perma Life*,¹¹⁹ it is impossible to use *in pari delicto* to promote deterrence of one group without providing a reciprocal incentive to another group. A denial of the defense derives its deterrent effect from the threat of recovery by a coconspirator. Unhappily, however, that deterrence cannot be achieved unless the coconspirator is allowed to recover. Conversely, if no coconspirator is allowed to sue, no one is given the incentive of a possible recovery, but the deterrent effect that can be realized through such suits is lost altogether. Finally, if the lower courts' current approach to the problem¹²⁰ is used and some firms are allowed to sue and others not, a double disincentive¹²¹ is imposed on one group only by giving the other a double incentive.¹²² It is clear, therefore, that no system will provide deterrence without also providing an incentive to one who has participated

117. See notes 111-13 *supra* and accompanying text.

118. See notes 105-10 *supra* and accompanying text. *But cf.* Lane, *supra* note 81 (arguing that businesses in a weak or declining financial position, as measured by employment cutbacks, are prime candidates for trade practice violations).

119. *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134 (1968). The difficulty for the Justices in *Perma Life* was that disallowing the defense would deter the defendant but provide an incentive for the plaintiff. Although they were concerned with deterrence, they reached different conclusions about whether the defense could be an effective deterrent. See text accompanying notes 73-75 *supra*.

120. See notes 54-62 *supra* and accompanying text.

121. Technically there are not two disincentives, but one disincentive and the absence of an incentive. When the defense is disallowed to a single class of litigants, all members of that class are subject to suit (the disincentive) but are not permitted to recover from nonmembers (the lack of an incentive).

122. Again, there are not two incentives, but an incentive (the possibility of recovery) and the absence of a disincentive (immunity to suit by coconspirators).

in an illegal activity. Even assuming that maximization of deterrence outweighs the ethical anomaly of allowing a wrongdoer to recover,¹²³ no system can be justified unless it generally provides both the greatest deterrence and the smallest incentive to illegal conduct. Any principled determination of what such a system should be must rest upon an inquiry into those characteristics that make a firm more or less susceptible to deterrence and the effect, given such characteristics, that each of the possible applications of the defense will have.

There are three possible applications of *in pari delicto*: (1) the defense could be abolished, so as to never bar recovery by a coconspirator; (2) the defense could operate as a bar to recovery by coconspirators in every case; or (3) the defense could be applied so as to bar recovery by some coconspirators but not others. None of the Justices in *Perma Life*, nor any of the lower courts following that decision, has been persuaded by the second alternative.¹²⁴ Such a result is not surprising. Allowing any degree of participation, no matter how minor, to act as an absolute bar to suit by a coconspirator is, in terms of deterrence, the least effective option. Under such a rule, all parties would be relieved of any threat of suit by coconspirators, and a potent source of deterrence would be altogether lost. True, the system would be relieved of the ethical anomaly of allowing a wrongdoer to recover, and the violators would be deprived of any incentive they might have if they were allowed to recover. But it cannot be reasonably gainsaid that the threat of suit by well-informed coconspirators will have a far greater deterrent effect—even when offset by the possible incentive of an opportunity to recover—than will the absence of the possibility of recouping losses should the anticompetitive scheme go awry.¹²⁵

123. See note 71 *supra*.

124. Despite the plurality's apparent backtracking, see notes 33-37 *supra* and accompanying text, it is at least clear that the theoretical possibility of doing away with *all* suits by coconspirators was never seriously considered. Moreover, even Justice Harlan implies that there may be cases where the defense should be disallowed because the plaintiff is not "substantially as much responsible . . . as the defendants." *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 156 (1968) (Harlan, J., concurring in part and dissenting in part).

125. This conclusion should not be surprising. Complete abrogation of *in pari delicto* would open all parties to treble damage liability to coconspirators. An absolute defense of *in pari delicto* would completely foreclose this possibility. Risk taking firms would tend to fear the former prospect more than the latter because additional liability might upset the calculus of risk that so often allows these firms to break the law with impunity. For risk averse firms it would be an additional weapon in the arsenal of deterrents that such firms already find compelling. Complete foreclosure of the right to sue coconspirators would, on the other hand, merely deny both types of businesses the "insurance policy" that is provided by suits to recover unrealized gain. But since it is unlikely that any firm will willingly enter a conspiracy that lacks a good chance

One implication of this conclusion is especially important: insofar as the threat of suit provides a more effective deterrent to anti-trust violations than does depriving coconspirators of a possible recovery, it follows that in any situation where no reasonable distinction can be made regarding the conspirators' susceptibility to deterrence,¹²⁶ all of them should be allowed to sue.¹²⁷ The question remains, however, as to whether, when a distinction between the conspirators can be made, deterrence is maximized by completely abolishing *in pari delicto* and allowing all to sue or by retaining the defense in a limited form. Phrased somewhat differently, the problem is whether there are circumstances in which it would maximize deterrence to prevent some coconspirators from suing even though, as a general matter, deterrence is best served by allowing such recoveries.

Although deterring risk averse firms is not an unimportant objective, the heaviest burden of deterrence should be directed at the risk taking firms. It is those firms that provide the organizational impetus for the anticompetitive activity and voluntarily embark upon the illegality.¹²⁸ If they could be effectively deterred, the world of antitrust violators would be deprived of its leaders. Where, however, all parties are allowed to sue, these risk takers have an opportunity to recover their losses should the scheme go awry.¹²⁹ Even if the threat of suit outweighs the benefit of a possible recovery,¹³⁰ maximum deterrence of these firms requires that they be *both* subjected to the threat of suit *and* deprived of the possibility of recovery.

Achieving such a result, however, requires that the courts, in essence, provide a double incentive to the risk averse firms:¹³¹ the defense of *in pari delicto* would be available to them but not to their

of success, this deterrent would prove less persuasive than the additional threat of treble damages.

126. For an outline of some of the factors upon which such a distinction should be based, see pp. 84-86 *infra*.

127. Such a conclusion runs directly contrary to what appears to be the present practice of the courts to allow the *in pari delicto* defense where the fault of the parties is equal. See note 54 *supra*. Allowing the defense in such cases is perhaps the most important result of giving more weight to a finding of culpability than to the need for deterrence. See notes 154-64 *infra* and accompanying text. Although, in a retributive system, it makes little sense to allow one party to recover from another no more guilty than he is, the object should not be retribution but deterrence, and deterrence is maximized by disallowing the defense and allowing recovery in all but the exceptional case. See notes 128-42 *infra* and accompanying text.

128. See notes 111-13 *supra* and accompanying text.

129. This is exactly the "no-lose" situation that so troubled the five Justices in *Perma Life* who did not join in the plurality opinion. See generally notes 38-49 *supra* and accompanying text.

130. See note 125 *supra* and accompanying text.

131. See notes 121-22 *supra* and accompanying text.

risk taking coconspirators. Thus risk averse firms would be allowed to recover and yet would be protected from successful assertion of claims against them.¹³² In evaluating the propriety of such a result, two factors should be noted. First, it is the risk takers that provide the impetus to illegal activity. If the risk takers are deterred, the courts need not be overly concerned with the risk averse firms. So long as the threat of suit by third parties and the government exists, the entry of risk averse firms upon a course of anticompetitive activity will inevitably be less than fully voluntary.¹³³ Second, protecting risk averse firms from recoveries by their coconspirators will have little effect upon the actions of those firms. In terms of deterrence the threat of recovery was redundant in the first place.¹³⁴

The crucial question, however, is whether holding out a promise of recovery without the offsetting threat of suit will significantly increase the willingness of risk averse firms to engage in illegal activity. The answer is almost certainly no.¹³⁵ First of all, the firm's managers will be unable to determine how a court will ultimately classify the firm.¹³⁶ Thus, the rule that, all things being equal, all coconspirators will be permitted to sue each other will require the managers to presume that their firm will not be immune from suit.¹³⁷ Second, given the manner in which a risk averse firm will be identified by the courts,¹³⁸ a voluntary decision to run the risk will count heavily against a firm when the court decides whether the defense should be allowed. Third, although the promise of recovery may provide an incentive to illegal activity, entitlement to that recovery is not easily predicted,¹³⁹ and the costs of failing to qualify are significant.¹⁴⁰

132. This is true whenever the risk averse firm is suing a risk taking firm. Where, however, the suit is between two risk averse firms, the fact that no distinction can be drawn with respect to the parties' susceptibility to deterrence will mandate that the defendant not be allowed to assert the defense despite its status as a risk averse firm. See notes 124-27 *supra* and accompanying text.

133. See notes 105-10 *supra* and accompanying text.

134. It is the threat of suits by the government or third parties that keeps the risk averse firm from voluntarily embarking upon anticompetitive activity. See notes 105-10 *supra* and accompanying text. Those disincentives alone are sufficient, and adding the threat of suit by coconspirators will not have any significant effect on its pre-existing unwillingness to join in illegality.

135. In contrast, the disincentives of government and third party actions are *ex hypothesi* insufficient to prevent the risk taking firms from undertaking illegal activity. Thus, giving them the incentive of a possibility of recovery should their scheme go awry will serve to increase, at least incrementally, their willingness to take the risks.

136. See note 108 *supra*.

137. See notes 126-27 *supra* and accompanying text; text accompanying note 143 *infra*.

138. See pp. 84-86 *infra*.

139. The standards proposed here are relative. See notes 145-46 *infra* and accompanying text. Thus, even a risk averse firm's ability to gain a recovery from its coconspirators or to avoid a recovery by them depends upon its being able to show that it is *more* of a risk averse firm than its adversary.

140. There is always the potential that a risk averse firm defendant will be

Given the awareness of the firm's managers that their own and perhaps their firm's survival may depend upon avoiding antitrust liability, it is exactly such gambles that risk averse firms are unwilling to take. Finally, the possibility of recovery from coconspirators does nothing to alleviate the fears that keep risk averse firms honest in the first place. An incentive or deterrent, to be effective, can only operate at the point of contemplation. The possibility of recovery from coconspirators can provide encouragement, therefore, only when the actor is operating under a significant, conscious, and pre-existing fear that the conspiracy itself will prove to be unprofitable. The risk averse firm, *ex hypothesi*, will not enter an anti-competitive conspiracy even when it is guaranteed to enhance profits,¹⁴¹ for the deterring factor is not the questionable profitability of the activity,¹⁴² but the threat of treble damages. Thus, it appears that even the "double incentive" of allowing the risk averse firm to sue but not be sued will have little, if any, effect upon its willingness to engage in anticompetitive activity. Even if it does produce some increase in the likelihood of participation by risk averse firms, that increase is far outweighed both in magnitude and significance by the benefits that would accrue from deterring risk takers.

From the foregoing, three significant principles can be distilled:

(1) Since, all else being equal, deterrence is maximized by allowing all coconspirators to sue, there should be a general presumption against the availability of the defense of *in pari delicto*.¹⁴³

(2) As a consequence of the above presumption, in any case in which the court is unable to make a meaningful distinction between the plaintiff and the defendant in terms of their susceptibility to deterrence, the defendant should not be permitted to interpose an *in pari delicto* defense.¹⁴⁴

unable to sustain its burden of showing that it is less deserving of deterrence than the plaintiff. See note 146 *infra*. Such a failure is impossible to predict at the moment of contemplation, and the risk averse firm will therefore be left in considerable doubt as to whether it can avoid suits by its coconspirators.

141. See notes 105-10 *supra* and accompanying text.

142. In contrast, the only question for the risk taking firms is whether the profitability of the contemplated activity, as discounted by the probability and magnitude of the potential liability, is potentially greater than that which could be achieved legally. If the answer is yes, the activity is pursued. See notes 111-13 *supra* and accompanying text.

143. See notes 124-27 *supra* and accompanying text.

144. *Id.* As noted earlier, this would reverse present practice with respect to parties of equal fault. See note 127 *supra*.

(3) Where, however, such a distinction can be made¹⁴⁵ and it appears that the plaintiff is significantly more likely than the defendant to enter upon such conspiracies voluntarily,¹⁴⁶ the defendant should be permitted to raise *in pari delicto* as a defense.¹⁴⁷

C. IDENTIFYING THE RISK AVERSIVE FIRM

As outlined above, overall deterrence of anticompetitive activity can be maximized by allowing risk averse firms to assert the defense of *in pari delicto* when sued by a risk taking firm,¹⁴⁸ despite the fact that, as a general matter, deterrence is best pursued by eliminating the defense.¹⁴⁹ Obviously such a system requires that the courts have some reasonable basis for attempting to distinguish between the two classes of firms. It is probably unrealistic to suggest that such distinctions can be made by a direct examination of the company's economic strength and the perceptions of its management. But the theory underlying the distinction suggests that these factors will manifest themselves in certain activity,¹⁵⁰ which, if properly identified and evaluated, will lead to as accurate a determination as possible.

Although Justice White, in his *Perma Life* concurrence, was seeking to distinguish between more and less culpable parties,¹⁵¹ his intuitions about the factors which should govern the availability of the defense were nevertheless sound. He outlined four factors to be examined:

- (1) the relative responsibility for initiating the scheme;

145. Some of the factors upon which such a distinction would be based are outlined in Section C *infra*.

146. The burden of proving the distinction and the relative voluntariness should rest upon the defendant. Such a result is dictated by the presumption in favor of allowing recoveries. See text accompanying note 143 *supra*.

147. It is probably this system at which the *Perma Life* plurality was aiming. Justice Black's categorical rejection of *in pari delicto* followed so shortly by his reservation of the question whether "truly complete involvement and participation in a monopolistic scheme could ever be a basis . . . for barring a plaintiff's cause of action," *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 140 (1968), only makes sense when interpreted as follows: *in pari delicto* has no place in antitrust enforcement because, when plaintiff and defendant are *equally* culpable, deterrence is maximized by allowing them to sue. It is only when the defendant is significantly *less* culpable that allowing him to avoid liability should be considered. See notes 162-64 *infra* and accompanying text.

148. See notes 128-42 *supra* and accompanying text.

149. See notes 124-27 *supra* and accompanying text.

150. See notes 105-13 *supra* and accompanying text.

151. See *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 146-47 (1968) (White, J., concurring).

- (2) whether the party could reasonably have been expected to benefit from the illegality;
- (3) the relative responsibility for maintaining the conspiracy and the degree to which the party attempted to withdraw;
- (4) the ultimate winners and losers.¹⁵²

While all of these factors may be equally important in determining culpability, when the inquiry is properly focused on identifying risk averse firms, as opposed to culpable ones, it becomes clear that the most important factors are those that indicate voluntariness of participation. Risk averse and risk taking firms are distinguished, behaviorally, by the differences in their willingness to engage in anticompetitive activity.¹⁵³ Therefore, of the four factors outlined by Justice White, the first and third are the most important. A risk averse firm will demonstrate reluctance at every point in the conspiracy. Its original entry will be less than fully voluntary; its participation will be reluctant; it will resist efforts to broaden the conspiracy in scope or intensity; and it will attempt to withdraw or bring the illegal activity to an end at the earliest possible moment. In contrast, the risk taking firm will tend to enter the conspiracy voluntarily, to perpetuate and expand it, and to resist efforts by others to weaken or terminate the arrangement. Thus it is the degree of voluntariness exhibited by the parties that must ultimately guide the courts in determining which firms are entitled to assert the defense.

By contrast, Justice White's second and fourth factors¹⁵⁴ illustrate the misleading nature of the inquiry into "culpability." While a firm's expectations of profit and the fulfillment of those expectations may have some bearing on the question of culpability, they bear little if any relation to the more important question of the firm's attitude toward risk. A reasonable expectation of benefit from the illegal conduct is indicative of the nature of the firm only to the extent that the scheme was *not* likely to benefit that party. That is, if a firm embarks upon illegal activity despite the fact that it would appear to be unprofitable, it is likely that the entry was not entirely voluntary. This, in turn, may indicate that the firm is risk averse. On the other hand, however, the fact that the firm could reasonably have been expected to benefit from the scheme reveals nothing significant about that firm's attitude toward risk. Similarly, that a party did or did not ultimately profit from the illegal activity is irrelevant to the question whether the firm is willing to risk violation of the antitrust laws in order to maximize profits.

152. See *id.*

153. See notes 105-13 *supra* and accompanying text.

154. See text accompanying note 152 *supra*.

Such a list of factors can never be more than exemplary—indeed, the relevant considerations will vary from case to case. Nevertheless, it is clear that the inquiry must be rooted in an effort to maximize deterrence rather than retribution and that the maximization of deterrence is a function not of culpability but of the nature of the actors. Before ruling on the appropriateness of an *in pari delicto* defense, therefore, the court should determine whether the defendant has demonstrated a basic unwillingness to enter into and maintain the conspiracy sufficient to indicate that deterring it is relatively less important than denying to the plaintiff the incentive of recovery. It is expected that if the courts approach the question of *in pari delicto* in such a manner, deterrence will be substantially enhanced and the decisions will be more lucid, consistent, and valuable.

IV. CONCLUSION

As a general matter, the plurality opinion in *Perma Life* appears to have been well conceived. In most cases, *in pari delicto* does indeed have no place in antitrust enforcement,¹⁵⁵ for as a deterrent the threat of suit even with a concomittant possibility of recovery is far more effective than a deprivation of the opportunity to recover from coconspirators.¹⁵⁶ It is equally true, however, that, as the *Perma Life* plurality intimated,¹⁵⁷ the maximization of deterrence will occasionally justify ignoring the general rule and allowing the defendant to resist recovery.¹⁵⁸ The plurality's failure lay in its inability to formulate guidelines that would direct the lower courts in applying that exception. This gap was, at least in part, filled by Justice White in his concurrence,¹⁵⁹ but his contribution was vitiated by his failure to recognize that the nature of the actor and not his culpability determines the effectiveness of deterrence.¹⁶⁰ This confusion has not surprisingly been reflected in the lower court decisions following *Perma Life*. First, the lower courts have been largely inarticulate in describing the standards that govern the availability of the defense.¹⁶¹ Second, because of their emphasis on culpability, the courts have consistently failed to examine the factor that originally justified the *Perma Life* result: the effect that allowing or disallowing the defense would have on deterrence. Instead, they have formulated a

155. See 392 U.S. at 140.

156. See notes 124-27 *supra* and accompanying text.

157. See 392 U.S. at 140; note 147 *supra*.

158. See notes 128-44 *supra* and accompanying text.

159. 392 U.S. at 146-47 (White, J., concurring).

160. See notes 151-54 *supra* and accompanying text.

161. See note 69 *supra* and accompanying text.

system rooted primarily in retribution¹⁶² and at best coincidentally related to deterring antitrust violations.¹⁶³ Finally, as a result of the emphasis on culpability, the courts have come full circle, largely reversing the presumption implicit in the *Perma Life* plurality opinion that allowance of the defense should be the exception rather than the rule, and have generally denied the defense only when the plaintiff is significantly less culpable than the defendant.¹⁶⁴

This Note has attempted to point out some of these problems, to suggest a proper theoretical basis for examining the relation between *in pari delicto* and deterrence of antitrust violations, and to outline, at least generally, the factors involved in determining whether a given situation is exceptional enough to warrant allowing the defense. It remains for the courts to clarify and enlarge upon those factors. But successful deterrence can be effectively pursued only if the courts emphasize prevention of future violations and formulate their decisions in a considered effort to maximize deterrence.

162. See notes 54-67 *supra* and accompanying text; note 127 *supra*.

163. See note 115 *supra* and accompanying text.

164. See notes 54-67 *supra* and accompanying text.

